

Commodity Futures Trading Commission

§ 190.10

for the nonrecovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers.

(6) *Margin payments.* The trustee may make margin payments on behalf of any account which do not exceed the funded balance of that account.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122, Apr. 1, 1983, as amended at 59 FR 17471, Apr. 13, 1994; 67 FR 58298, Sept. 13, 2002]

§ 190.09 Member property.

(a) *Member property.* “Member property” means, in connection with a clearing organization bankruptcy, the property which may be used to pay that portion of the net equity claim of a member which is based on its house account.

(b) *Scope of member property.* Member property shall include all money, securities and property received, acquired, or held by a clearing organization to margin, guarantee or secure the proprietary account, as defined in §1.3(y) of this chapter, of a clearing member: *Provided, however,* That any guaranty deposit or similar payment or deposit made by such member and any capital stock, or membership of such member in the clearing organization shall also be included in member property after payment in full of that portion of the net equity claim of the member based on its customer account and of any obligations due the clearing organization which may be paid therefrom in accordance with the by-laws or rules of the clearing organization, including obligations due from the clearing organization to customers or other members.

§ 190.10 General.

(a) *Notices.* Unless instructed otherwise, all mandatory or discretionary notices to be given to the Commission under this part shall be directed to the Washington, DC headquarters of the Commission (Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581) and addressed to the Secretariat, for the attention of the Director of the Division of Clearing and Intermediary Oversight. All such notices shall be in writing and shall be given by telegram or other similarly rapid means of communication. For purposes of this part,

notice to the Commission shall be deemed to be given only upon actual receipt.

(b) *Request for exemption from time limit.* (1) A trustee or any other person charged with the management of a commodity broker which has filed a petition in bankruptcy, or against which such a petition has been filed, may for good cause shown request from the Commission an exemption from, or extension of, any time limit prescribed by this part 190: *Provided,* That no such exemption or extension will be granted for any time period established by the Bankruptcy Code, as amended, 11 U.S.C. 101 *et seq.*

(2) Such a request shall be made *ex parte* and by any means of communication, written or oral: *Provided,* That an oral request shall be confirmed in writing within one business day and such confirmation shall contain all the information required by paragraph (b)(3) of this section. Any such request shall be directed to the person as provided in paragraph (a) of this section, and at the address provided therein.

(3) Such a request shall state the particular provision of the part 190 rules with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and the Commission's part 190 regulations promulgated thereunder.

(4) The Director of the Division of Clearing and Intermediary Oversight, or such members of the Commission's staff acting under his direction as he may designate, on the basis of the information provided in any such request, shall determine, in his sole discretion, whether to grant, deny or otherwise respond to a request, and shall communicate that determination by the most appropriate means to the person making the request and to the bankruptcy court with jurisdiction over the case.

(c) *Disclosure statement for non-cash margin.* (1) Except as provided in §1.65 of this chapter, no commodity broker (other than a clearing organization) may accept property other than cash

from or for the account of a customer, other than a customer specified in § 1.55(f) of this chapter, to margin, guarantee, or secure a commodity contract unless the commodity broker first furnishes the customer with the disclosure statement set forth in paragraph (c)(2) of this section in boldface print in at least 10 point type which may be provided as either a separate, written document or incorporated into the customer agreement, or with another statement approved under § 1.55(c) of this chapter and set forth in appendix A to § 1.55 which the Commission finds satisfies this requirement.

(2) The disclosure statement required by paragraph (c)(1) of this section is as follows:

THIS STATEMENT IS FURNISHED TO YOU BECAUSE RULE 190.10 (c) OF THE COMMODITY FUTURES TRADING COMMISSION REQUIRES IT FOR REASONS OF FAIR NOTICE UNRELATED TO THIS COMPANY'S CURRENT FINANCIAL CONDITION.

1. YOU SHOULD KNOW THAT IN THE UNLIKELY EVENT OF THIS COMPANY'S BANKRUPTCY, PROPERTY, INCLUDING PROPERTY SPECIFICALLY TRACEABLE TO YOU, WILL BE RETURNED, TRANSFERRED OR DISTRIBUTED TO YOU, OR ON YOUR BEHALF, ONLY TO THE EXTENT OF YOUR PRO RATA SHARE OF ALL PROPERTY AVAILABLE FOR DISTRIBUTION TO CUSTOMERS.

2. NOTICE CONCERNING THE TERMS FOR THE RETURN OF SPECIFICALLY IDENTIFIABLE PROPERTY WILL BE BY PUBLICATION IN A NEWSPAPER OF GENERAL CIRCULATION.

3. THE COMMISSION'S REGULATIONS CONCERNING BANKRUPTCIES OF COMMODITY BROKERS CAN BE FOUND AT 17 CODE OF FEDERAL REGULATIONS PART 190.

(3) The statement contained in paragraph (c)(2) of this section need be furnished only once to each customer to whom it is required to be furnished by this section.

(d) *Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.* (1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Intermediary Oversight, and to such members of the Commission's staff acting under his direction as he may designate, all the functions of the

Commission set forth in this part except the authority to approve or disapprove a withdrawal or settlement of a commodity account by a public customer pursuant to § 190.06(g)(3).

(2) The Director of the Division of Clearing and Intermediary Oversight may submit to the Commission for its consideration any matter which has been delegated to him pursuant to paragraph (d)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Intermediary Oversight under paragraph (d)(1) of this section.

(e) *Forward contracts.* For purposes of this part, an entity for or with whom the debtor deals who holds a claim against the debtor solely on account of a forward contract will not be deemed to be a customer.

(f) *Notice of court papers pertaining to the operation of the estate.* The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court papers shall be directed to the Washington, DC headquarters of the Commission addressed as provided in paragraph (a) of this section.

(g) *Other.* The Bankruptcy Code will not be construed by the Commission to prohibit a commodity broker from doing business as any combination of the following: futures commission merchant, commodity option dealer, foreign futures commission merchant or leverage transaction merchant, nor will the Commission construe the Bankruptcy Code to permit any operation, trade or business, or any combination of the foregoing, otherwise prohibited by the Act or by any rule, regulation or order of the Commission thereunder.

(h) *Rule of construction.* Contracts in security futures products held in a securities account shall not be considered to be "from or for the commodity futures account" or "from or for the commodity options account" of such

customers, as such terms are used in section 761(9) of the Bankruptcy Code.

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97-444); secs. 761-766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97-222, 96 Stat. 235 (1982), 11 U.S.C. 761-766 (Supp. V. 1981 as amended by Pub. L. 97-222))

[48 FR 8739, Mar. 1, 1983, as amended at 48 FR 28980, June 24, 1983; 58 FR 17505, Apr. 5, 1993; 59 FR 34382, July 5, 1994; 60 FR 49336, Sept. 25, 1995; 63 FR 8571, Feb. 20, 1998; 67 FR 58298, Sept. 13, 2002; 67 FR 62353, Oct. 7, 2002]

APPENDIX A TO PART 190—BANKRUPTCY FORMS

BANKRUPTCY APPENDIX FORM 1—OPERATION OF THE DEBTOR'S ESTATE—SCHEDULE OF TRUSTEE'S DUTIES

For the convenience of a prospective trustee, the Commission has constructed an approximate schedule of important duties which the trustee should perform during the early stages of a commodity broker bankruptcy proceeding. The schedule includes duties required by this part, subchapter IV of chapter 7 of the Bankruptcy Code as well as certain practical suggestions, but it is only intended to highlight the more significant duties and is not an exhaustive description of all the trustee's responsibilities. It also assumes that the commodity broker being liquidated is an FCM. Moreover, it is important to note that the operating facts in a particular bankruptcy proceeding may vary the schedule or obviate the need for any of the particular activities.

ALL CASES

Date of Order for Relief

1. Assure that the commodity broker has notified the Commission and its designated self-regulatory organization ("DSRO") that a petition or order for relief has been filed (§190.02(a)(1)).

2. Attempt to estimate short-fall in customer segregated funds.

a. If there is a substantial short-fall of customer segregated funds, the trustee should:

i. Contact the DSRO and attempt to effectuate a transfer under section 764(b) of the Code (hereinafter "bulk transfer"); notify the Commission for assistance (§§190.02(a)(2) and (e)(1), §190.06(b)(2), (e), (f)(3), (g)(2), and (h)) but recognize that a bulk transfer is highly unlikely.

ii. If a bulk transfer cannot be effectuated, liquidate all customer commodity contracts, except dealer options and specifically identi-

fiable commodity contracts which are bona fide hedging positions (as defined in §190.01(kk)(2)) with instructions not to be liquidated. (See §§190.02(f) and 190.06(d)(1)). (In this connection, depending upon the size of the debtor and other complications of liquidation, the trustee should be aware of special liquidation rules, and in particular the availability under certain circumstances of book-entry liquidation (§190.04(d)(1)(ii)).

b. If there is a small short-fall of customer segregated funds, negotiate with the clearing organization to effect a bulk transfer; notify the Commission (§§190.02(a)(2) and (e)(1), 190.06(b)(2), (e), (f)(3), (g)(2), and (h)).

3. Whether or not a transfer has occurred, liquidate or offset open commodity contracts not eligible for transfer (*i.e.*, deficit accounts, accounts with no open positions) (§190.06(e)(1)).

4. Offset all futures contracts which would otherwise remain open beyond the last day of trading or first day on which notice of intent to deliver may be tendered; offset long options on a physical commodity which cannot be settled in cash, have value and would be automatically exercised or would remain open beyond the last day of exercise; and offset all short options on a physical commodity which cannot be settled in cash (§190.02(f)(1)).

5. Compute estimated funded balance for each customer commodity account containing open commodity contracts (§190.04(b)) (daily thereafter).

6. Make margin calls if necessary (§190.02(g)(1)) (daily thereafter).

7. Liquidate or offset any open commodity account for which a customer has failed to meet a margin call (§190.02(f)(1)) (daily thereafter).

8. Commence liquidation or offset of specifically identifiable property described in §190.02(f)(2)(i) (property which has lost 10% or more of value) (and as appropriate thereafter).

9. Commence liquidation or offset of property described in §190.02(f)(3) ("all other property").

10. Be aware of any contracts in delivery position and rules pertaining to such contracts (§190.05).

First Business Day After the Entry of an Order for Relief

1. If a bulk transfer occurred on the date of entry of the order for relief:

a. Liquidate any remaining open commodity contracts, except any dealer option or specifically identifiable commodity contract [hedge] (See §190.01(kk)(2) and §190.02(f)(1)), and not otherwise transferred in the bulk transfer.

b. Primary liquidation date for transferred or liquidated commodity contracts (§190.01(ff)).